No. 95-740

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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UNION SECURITY LIFE INSURANCE COMPANY, *Petitioner*

*v.*

EVELYN CROCKER,

*Respondent*

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**On Petition for a Writ of Certiorari to the Supreme Court of Alabama**

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## SUPPLEMENTAL BRIEF FOR THE PETITIONER

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## SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner Union Security Life Insurance Company respectfully submits this supplemental brief to call attention to new authority not available at the time of petitioner's last filing. Petitioner respectfully submits that in light of the recent decision in *BMW of North America, Inc.* v. *Gore*, 64 U.S.L.W. 4335 (May 20, 1996), the Court in this case should — at a minimum — grant certiorari, vacate the judgment below, and remand the case for further consideration in light of *BMW*, just as the Court did with four cases yesterday.[1] In the alternative, because it is so clear that the award of punitive damages in this case is grossly excessive, the Court may wish to reverse the judgment below summarily and remand solely for the purpose of allowing the Alabama Supreme Court to select in the first instance the appropriate remedy for the unconstitutional punitive exaction in this case.

1. In *BMW*, this Court considered the constitutionality of an award of punitive damages in the same amount ($2 million) and upheld by the same court (the Supreme Court of Alabama) as the award at issue here. The Court cited a number of factors that led it to conclude that the award in *BMW* was so "grossly excessive" as to amount to a deprivation of property without due process. Each factor is present in this case. Indeed, this case involves an even more egregious excess than did *BMW*.

a. The first concern that led the Court to invalidate the award in *BMW* was that "[t]he award must be analyzed * * * with consideration given only to the interests of Alabama consumers, rather than those of the entire nation." 64 U.S.L.W.

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[1] *Apache Corp.* v. *Moore*, No. 95-1414 (May 28, 1996); *Combustion Engineering, Inc.* v. *Johansen*, No. 95-1072 (May 28, 1996); *Ford Motor Co.* v. *Sperau*, No. 95-771 (May 28, 1996); *Oxy USA Inc.* v. *Continental Trend*, No. 94-1838 (May 28, 1996). The now-vacated decision of the Alabama Supreme Court in one of these cases, *Sperau*, was cited in respondent's brief in opposition in support of the punitive award in the present case. Br. in Opp. 11-12.

at 4339. The Court so held because it lacked a sufficient indication that any State other than Alabama would regard BMW's conduct as unlawful. So too here, there is no reason to believe — and petitioner makes no effort to pretend — that any State other than Alabama would require an insurance company to pay not only benefits but also punitive damages to a person who obtained insurance by dissembling about the insured's health history. As we observed in the petition (at 19), the best information in the record about Union Security's sale of credit life insurance in Alabama in 1991 shows only $67,019 in earnings. Here, as in *BMW*, there is no relationship between the multimillion-dollar punitive award and the interests of *Alabama* consumers.

b. The Court's second expressed concern in *BMW* was that there must be *fair notice* of both the conduct that will be considered wrongful and the severity of the penalty that a State may impose. 64 U.S.L.W. at 4339 & n.22. This case badly flunks the fair-notice requirement. As we explained in the petition (at 15 n.13), the Alabama Code, insurance regulations, and court decisions all suggested that it is *proper* to deny coverage because of material and apparently fraudulent misstatements or omissions in an insurance application that, if corrected, would have led the insurer to decline coverage. That is indisputably the case here. Petitioner had no warning whatever that the Alabama Supreme Court would announce that it is wrongful to investigate claims made during the one-year contestability period that appear to be related to a condition listed on the Health Statement. To impose punitive damages in any amount for such conduct is constitutionally suspect, and to impose multimillion-dollar punitive damages is a flagrant denial of due process.

c. The Court in *BMW* relied heavily on the absence of "aggravating factors" showing a high "degree of reprehensibility" of BMW's conduct. 64 U.S.L.W. at 4340. So too here, it is hard to understand how anyone could think that Union Security did *anything* wrong, let alone engaged in such aggravat-

ed conduct as to support a multimillion-dollar exaction. As we have explained, petitioner was punished for an isolated act of misconduct by its "agent," a branch manager at First Alabama, Choctaw, whose fraud was calculated to benefit the bank and was directed principally at petitioner itself; petitioner was the target, not the perpetrator, of the fraud. Even if one suspends disbelief enough to think that petitioner actually did something wrong, it is just as true here as it was in *BMW* (see 64 U.S.L.W. at 4340) that the harm caused was solely economic and that there was no indifference to or reckless disregard for the health or safety of others. And petitioner, like BMW, was in no sense a recidivist (see *id.* at 4341); as we pointed out in the reply brief (at 7-8), respondent has been unable to unearth, from among the tens of thousands of credit life transactions each year, a single other incident of fraud on the part of either Taylor or any other agent. The trial court itself expressly found that the alleged fraud in this case was "an isolated incident." Pet. App. 23a; see also *id.* at 20a.

d. The Court in *BMW* debunked the notion — prominently featured in respondent's brief in opposition in this case (at 14-15) — that a high ratio of punitive damages to the actual harm inflicted on the plaintiff may be disregarded as constitutionally insignificant. It is true that there is no mathematical bright line separating acceptable from unacceptable ratios, but *BMW* exposes as false the *non sequitur* (Br. in Opp. 14) that the ratio can for that reason simply be ignored. Indeed, *BMW* describes the ratio as "perhaps" the "most commonly cited indicium of an unreasonable or excessive punitive damages award." 64 U.S.L.W. at 4341. The "breathtaking 500 to 1" ratio in *BMW* put that award outside the range. In this case, as we explained in the petition (at 17-20) and the reply brief (at 4-7), the ratio can be calculated in a number of different ways, but *all* of the calculations show that a $2 million award to a person who paid (part of) a $1659.61 premium for insurance that she was never entitled to receive in the first place is equally if not more "breathtaking."

e. Finally, the Court in *BMW* compared the punitive award to the civil and criminal penalties that could be awarded for "comparable misconduct." 64 U.S.L.W. at 4342. Such a comparison is difficult in this case, if for no other reason than that it is inconceivable that any legislator or regulator would regard petitioner's actions as "misconduct" at all. A rough measure of the gross excessiveness of the punitive award in this case may be gained, however, by comparing the $2 million award in this case to the same $2000 maximum civil penalty under the Alabama Deceptive Trade Practices Act that the Court cited in *BMW*. *Ibid.* That statute is designed to combat consumer fraud, just as the award in this case supposedly is, and it is highly significant that the jury and reviewing courts here punished petitioner a thousand times more severely than the Alabama Legislature thought appropriate for other consumer frauds. Again, the clear teaching of *BMW* is that the award in this case is grossly excessive and cannot stand.

2. Application of the *BMW* factors shows not only that this case is so similar as to justify further consideration in light of *BMW*, but indeed that the award here is so clearly beyond the pale that the Court would be justified in reversing the judgment below outright rather than simply remanding for further consideration. The Court in *BMW* was reluctant to intrude on the prerogative of the state court to select in the first instance the proper remedy for the grossly excessive punitive damages award in that case. It accordingly remanded the case for the Supreme Court of Alabama to make an initial selection between a new trial and an independent determination by that court of "the award necessary to vindicate the economic interests of Alabama consumers." 64 U.S.L.W. at 4343. A similar course would be appropriate here. The Court should either remand for further consideration in light of *BMW*, or summarily reverse the judgment below and remand with instructions similar to those in *BMW*.

Respectfully submitted.

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